

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DANIEL PEREZ JR,

Plaintiff,

v.

BERNARD WARNER, RON
HAYNES, ROY GONZALEZ, JOHN
PADILLA, EARL X. WRIGHT,
MARGRET GILBERT,

Defendants.

CASE NO. 3:15-CV-05530-RBL-DWC

ORDER CONVERTING DEFENDANTS'
MOTION TO DISMISS TO A MOTION
FOR SUMMARY JUDGMENT

The District Court has referred this action, filed pursuant to 42 U.S.C. § 1983, to United States Magistrate Judge David W. Christel.

Defendants filed a Motion to Dismiss alleging Plaintiff has failed to state a claim for which relief can be granted. Dkt. 14. Defendants attached several exhibits to the Motion to Dismiss which are not part of the Complaint or record. Dkt. 14-1. Defendants assert the documents can be considered under the incorporation by reference doctrine. Dkt. 14, p. 3, n. 1.

“In ruling on a 12(b)(6) motion, a court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to

1 judicial notice.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). If, on a motion under
 2 12(b)(6),

3 matters outside the pleading are presented to and not excluded by
 4 the court, the motion must be treated as one for summary judgment
 5 under Rule 56. All parties must be given reasonable opportunity to
 6 present all the material that is pertinent to the motion.

7 Fed.R.Civ.P. 12(d). However, the Ninth Circuit has “extended the ‘incorporation by reference’
 8 doctrine to situations in which the plaintiff’s claim depends on the contents of a document, the
 9 defendant attaches the document to its motion to dismiss, and the parties do not dispute the
 10 authenticity of the document, even though the plaintiff does not explicitly allege the contents of
 11 that document in the complaint. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005); *see*
 12 *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

13 Several of the exhibits attached to the Motion to Dismiss are referenced in the Complaint
 14 and central to Plaintiff’s claims. *See* Dkt. 5, 14-1. Further, Plaintiff does not question the
 15 authenticity of the documents. *See* Dkt. 16. However, Defendants attached two letters and a kite
 16 not specifically identified in the Complaint. *See* Dkt. 14-1, Exhibits 5, 7. The Court finds
 17 Defendant has attached exhibits beyond the scope of the “incorporation by reference” doctrine.

18 The Court will consider all exhibits attached by Defendants. However, as documents
 19 attached to the Motion to Dismiss are on matters outside the pleading, the Motion must be
 20 treated as one for summary judgment under Rule 56. *See Garaux v. Pulley*, 739 F.2d 437, 438
 21 (9th Cir. 1984). Therefore, the Court converts Defendants’ Motion to Dismiss to a Motion for
 22 Summary Judgment.

23 Warning regarding dispositive motions

24 In transforming a dismissal into a summary judgment proceeding, the Court must inform
 a plaintiff proceeding *pro se* it is considering more than the pleadings and afford the opportunity

1 to present all pertinent material. *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996); *Lucas*
 2 *v. Department of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995). “If the pro se litigant is a prisoner, the
 3 district court’s duties are even greater: ‘The district court is obligated to advise prisoner pro se
 4 litigants of Rule 56 requirements.’” *Anderson*, 86 F.3d at 935 (quoting *Klinge v. Eikenberry*,
 5 849 F.2d 409, 411-12 (9th Cir. 1988)). Plaintiff is advised of the following:

6 A motion for summary judgment under Rule 56 of the Federal
 7 Rules of Civil Procedure will, if granted, end your case.

8 Rule 56 tells you what you must do in order to oppose a motion for
 9 summary judgment. Generally, summary judgment must be
 10 granted when there is no genuine issue of material fact – that is, if
 11 there is no real dispute about any fact that would affect the result
 12 of your case, the party who asked for summary judgment is entitled
 13 to judgment as a matter of law, which will end your case. When a
 14 party you are suing makes a motion for summary judgment that is
 15 properly supported by declarations (or other sworn testimony), you
 16 cannot simply rely on what your complaint says. Instead, **you**
must set out specific facts in declarations, depositions, answers
to interrogatories, or authenticated documents, as provided in
Rule 56(e), that contradict the facts shown in the defendant’s
declarations and documents and show that there is a genuine
issue of material fact for trial. If you do not submit your own
evidence in opposition, summary judgment, if appropriate,
may be entered against you. If summary judgment is granted,
your case will be dismissed and there will be no trial.

17 *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (emphasis added).

18 Furthermore, Local Civil Rule 7(b)(2) states a party’s failure to file necessary documents
 19 in opposition to a motion for summary judgment may be considered an admission the motion has
 20 merit.

21 Defendants’ optional additional briefing will be due on or before December 23, 2015.
 22 Plaintiff’s optional responsive briefing will be due on or before January 22, 2016. The Clerk is
 23 directed to rename Defendants’ Motion to Dismiss (Dkt. 14) to Motion for Summary Judgment
 24 and re-note the Motion for January 29, 2016.

1 Dated this 23rd day of November, 2015.

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3 David W. Christel
4 United States Magistrate Judge